

APPELLATE UPDATE

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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:
<https://opinions.arcourts.gov/ark/en/nav.do>

ANNOUNCEMENTS

REMINDER: Administrative Plans. 2019 is a year that all circuits are required to submit administrative plans to the Supreme Court. Plans are to be submitted by July 1st to be effective January 1, 2020.

CRIMINAL

Warren v. State, 2019 Ark. App. 33 [**sufficiency of the evidence; second-degree battery**] There was substantial evidence to support appellant's second-degree-battery conviction. Specifically, the evidence established that appellant injured a nursing assistant who was employed by a hospice provider. The injuries occurred while the victim was providing "postmortem care" to appellant's family upon the death of appellant's mother. Consoling and comforting the family was including in the victim's employment duties and she was acting in the course of her employment related to her medical training when appellant struck her. Accordingly, the trial court did not err when it denied appellant's motion for directed verdict. (Johnson, L.; CR-18-612; 1-23-19; Whiteaker, P.)

Kauffeld v. State, 2019 Ark. App. 29 [**error in sentencing order**] When a true clerical error arises in a sentencing order, the proper remedy is entry of a corrected sentencing order and not vacation of appellant's conviction or resentencing. (Pearson, W.; CR-18-497; 1-23-19; Klappenbach, M.)

Lewis v. State, 2019 Ark. App. 43 [**Fifth Amendment Right**] While testifying about the process used to extract information from appellant's cell phone, the witness explained that he could not recover deleted messages "without giving up the encryption password." Appellant sought to exclude the testimony and argued that he had the absolute right under the Fifth Amendment not to provide the State with the passcode to his iPhone and that the witness's reference to his exercise of that right was an improper comment on his right to remain silent. The trial court admitted the testimony and gave the jury an admonition. On review, the Court of Appeals concluded that the witness's inadvertent statement was not an improper comment on appellant's right to remain silent. Thus, the trial court's refusal to grant appellant's motion to strike the comment was not reversible error. [**confrontation clause**] A defendant's Sixth Amendment confrontation right may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. Video testimony is an exceptional procedure to be used only in exceptional circumstances. By permitting a witness for the State to testify remotely through two-way live video without clearly identifying the important public policy justifying violating appellant's Sixth Amendment right to confront the witness against him, the trial court abused its discretion. (Karren, B.; CR-17-1080; 1-30-19; Gruber, R.)

Lewis v. State, 2019 Ark. App. 45 [**motion to suppress**] Appellant asserted that his custodial statements should have been suppressed because the interrogator made false promises of leniency. Appellant argued that the offer of help was found in the following statement: "I'm going to help you as much as I can, but you've got to be one hundred percent with me. And, so, now, that's what I'm telling you—I wish a lot of folks that's incarcerated right now had the opportunity—Like I told you, I love my job because I'm in a predicament where I can help people. . . . [H]e's going to take my recommendation. . . . The only way, the only way that you can get help is that if you man up and you tell why this the truth. . . . I've seen where I've helped people in other counties and I explain why, and they didn't serve any jail time. I've seen where people came in here and said, hey, I didn't do this and didn't do this and found out they was lying, and the prosecutor threw the book at them and they in prison right now. . . . But the people that I do help and that allow me to help them, they might still get in trouble, but they get a hell of a lot better deal than getting the book thrown at them." The Court of Appeals concluded that the officer's comments could not be construed as a promise of leniency but rather an attempt to convince appellant to truthfully explain the facts surrounding the crime. Thus, the trial court did not err when it denied appellant's motion to suppress the custodial statements. (Carroll, R.; CR-16-1134; 1-30-19; Gladwin, R.)

Linell v. State, 2019 Ark. 25 [**writ of mandamus**] A prosecutor’s obligation pursuant to Ark. Code Ann. § 12-12-312 is not a ministerial function that is appropriate for a writ of mandamus absent the petitioner showing that the prosecutor discovered evidence retained by the lab that met the requirements of the statute. (Dennis, J.; CR-17-118; 1-31-19; Wood, R.)

CIVIL

Jefferson Hosp. Assoc. v. Smith, 2019 Ark. App. 27 [**hospital quality assurance privilege**] In its order, the court found that Jefferson was “not permitted to gather damning evidence then stamp it as ‘quality assurance’ or ‘peer review’ then not have a quality assurance committee proceeding and hide behind the statutory privilege.” The circuit court misinterpreted the statute by finding that a committee proceeding is a prerequisite to applying the statutory privilege. The statutory privilege encompasses records compiled by hospital administrative staff “in connection with” its quality-review process, not just the records from those cases that are ultimately referred to a committee. Because the circuit court applied an incorrect interpretation of the statute, the case is reversed and remanded for the court to reconsider the motion to compel. (Wyatt, R.; CV-17-983; 1-23-19; Harrison, B.)

Clark v. Eubanks, 2019 Ark. App. 49 [**prescriptive easement**] Although the evidence showed that the Clarks had openly used the roadway for more than seven years, time alone will not suffice to transform permissive use into legal title. There must be some circumstance in addition to length of use to show that the use was adverse. By the Clarks’ own testimony, there had been no objection to their use of the road until 2017. Even if the Clarks’ use of the road was adverse as to Jimmy Eubanks beginning in March 2017 when he purchased the property, this usage falls far short of the seven years required to ripen into a prescriptive easement. There was no evidence that the road had been used by the general public or that the Clarks had committed any overt acts that would have put the prior landowners on notice that an adverse use and claim of right were being exerted. (Martin, D.; CV-18-283; 1-30-19; Klappenbach, M.)

Stan v. Vences, 2019 Ark. App. 56 [**workers’ comp**] The circuit court erred in concluding that it had subject-matter jurisdiction over Vences’s complaint because the Workers’ Compensation Commission has exclusive, original jurisdiction to determine the facts that establish subject-matter jurisdiction. Vences’s complaint contains the allegation that the employer failed to provide workers’ compensation benefits for his employees. This one phrase in the complaint is the linchpin of Vences’s case. He argues that this allegation triggers the section 11-9-105(b)(1) exception; divests the Commission of its section 11-9-105(a) exclusive jurisdiction; and gives the circuit court subject-matter jurisdiction of his action. The allegations in Vences’s complaint—as a matter of law—fall squarely within the exclusive jurisdiction of the Commission. (Griffen, W.; CV-17-984; 1-30-19; Vaught, L.)

Phillips v. Delage Financial Services, 2019 Ark. App. 44 [**set aside judgment**] The circuit court found that Phillips presented no evidence of fraud or misrepresentation. Phillips's argument seems to be that he is entitled to a second opportunity to litigate the allegations in the complaint on the basis of his belated contentions they are false. Indeed, Phillips chose not to testify at the August hearing and offered no proof to support his contention of fraud or misrepresentation. [**Jurisdiction**] Phillips argues that the circuit court lacked jurisdiction because of the language in the contract allowing Memphis Communication Corporation to hail Phillips into the Minnesota court. The language from the lease agreement that the parties "consent to the jurisdiction and venue of the Federal and State courts in Minnesota" does not confer subject matter jurisdiction to Minnesota and its courts. It simply means that the parties agree to be hailed into Minnesota courts if necessary. (Lusby, R.; CV-18-354; 1-30-19; Virden, B.)

Tuccillo v. Adkins and Assoc., 2019 Ark. App. 55 [**summons/service**] The plain language of Rule 4(a) states only that the summons be issued "forthwith." Nothing in Rule 4(a), however, expressly provides that the summons must thereupon be served "forthwith." Instead, Rule 4(i) allows 120 days for serving the summons and complaint, unless the court extends the time for service upon good cause shown. As noted above, Tuccillo does not challenge any of the extensions that were granted by the circuit court, and any delay necessitating the issuance of a new summons reflecting the office of the circuit clerk's current personnel was because of Tuccillo's efforts to avoid service. [**guaranty**] The document plainly names the purchaser and the guarantor. There is no statute-of-frauds issue, nor was one raised at trial; and there is no need to resort to inference or parol evidence to determine the identity of the debtor. Simply put, Tuccillo is trying to create ambiguity where none exists. The guaranty agreement bound Tuccillo personally to pay the debts of Anchor. (Sutterfield, D.; CV-18-452; 1-30-19; Whiteaker, P.)

Protect Fayetteville v. State, 2019 Ark. 28 and 30 [**executive and legislative privilege**] Case recognized the existence of executive and legislative privileges in Arkansas. (Martin, D.; CV-17-873 and 849; 1-31-19; Wood and Wynne)

DOMESTIC RELATIONS

Smyth v. Smyth, 2019 Ark. App. 12 [**mediation mandated by order; dismissal of petition based on failure to mediate; circuit court can hear evidence regarding subject matter of mediation, not communications**] The appellate court found that the circuit court erred in dismissing Appellant's petition on the basis that she failed to attend mediation in good faith. The parties' Agreed Order mandated mediation before filing petitions with the circuit court, and the evidence before the circuit court was that the parties attended and participated in mediation without reaching an agreement. If the parties did not successfully mediate the issues, Appellant's remedy was to file her grievances with the circuit court. Because the parties agree that certain

issues were mediated before the filing, those portions of the petition should not have been dismissed. Regarding the additional issues, there was a dispute as to which were mediated before the filing, and the circuit court should have held a hearing before dismissing those claims. The appellate court also found that the circuit court should have afforded a longer window of time to complete mediation before dismissal. The appellate court also discussed Arkansas Code Annotated 16-7-206 which prohibits mediation communications from being disclosed and/or used as evidence against a participant. The appellate court found that subsection 206 does not prevent the circuit court from knowing the subject matter of the mediation; otherwise, the circuit court could never know in such a case whether there had been an attempt to mediate issues prior to motions being filed. (Bryan, E.; CV-18-363; 1-16-19; Glover, D.)

Szwedo v. Cyrus, 2019 Ark. App. 23 [**requirement to award retroactive child support from the date of the child's birth; creation of a trust in lieu of retroactive support payment to mother; child support amount supported by evidence; lack of prejudice in court ordering access to 10 years of medical records**] The appellate court found that Arkansas Code Annotated 9-10-111(a) requires an award of retroactive child support from the date of the child's birth, and that the Arkansas Child Support Guidelines are to be used in setting retroactive support. Because the circuit court failed to reference the Guidelines in determining Appellee's income for the relevant time periods and the amount of support due based on that income before moving to consideration of the deviation factors, the appellate court remanded for the circuit court to award retroactive support. While the appellate court expressed no opinion as to the proper amount of retroactive support, they stated that the court did not have the authority to order the retroactive child support to be placed in a trust or interest-bearing account. The creation of a trust or educational savings account is a deviation factor under the guidelines, but it cannot be ordered. The appellate court found no error in the circuit court's award of child support as the amount was supported by the evidence, and the circuit court explained its reasons for its conclusions. Lastly, the appellate court found no error in the circuit court allowing Appellee ten years of Appellant's medical records. The records were subject to an agreed protective order, the protective order provided that the records must be destroyed at the end of the litigation, and Appellant did not state how she was prejudiced by the ruling allowing access. (Smith, V.; CV-17-866; 1-23-19; Virden, B.)

Folkers v. Buchy, 2019 Ark. App. 30 [**discretion to limit extended visitation; attorney's fee award does not require explicit findings**] The circuit court found no error in the circuit court's award of visitation. Appellee contended that he should have more than three consecutive days during his visitation periods including extended summer visitation so that he can take his son on an extended vacation. A circuit court must be afforded the flexibility to deal with the myriad of circumstances confronting families in determining appropriate visitation. The appellate court found that visitation was set in a way to ensure frequent contact, while addressing the legitimate concerns about Appellant's ability to control his reaction to stressors and concerns about

Appellant's understanding of how his behaviors could be harmful to his son. The appellate court also found no error in the award of attorney's fees because the amount of an award are discretionary determinations, and the court is not required to explicitly state its reasons for doing so. Determination of the prevailing party is a relevant consideration, and Appellee was clearly the prevailing party. (Sutterfield, D.; CV-17-903; 1-23-19; Klappenbach, M.)

Schreckhise v. Parry, 2019 Ark. App. 48 [**modification of joint custody**] The appellate court found no error in the circuit court's modification of custody. Regarding the material change in circumstances, the circuit court emphasized that its decision was based in large part on its personal observations in the courtroom as well as the parties' deteriorating communication issues, which were to the determinant of the children, constituting a material change. Regarding best interest, the circuit court found that Appellee fostered Appellant's relationship with children and advocated for a free flow of information. In contrast, the circuit court found that Appellee had not acted in the children's best interest. Based on these findings and that the circuit court made no actual change in the amount of time that each parent spends with the children, the appellate court affirmed. (Taylor, J.; CV-18-154; 1-30-19; Harrison, B.)

PROBATE

In the Matter of the Guardianship of Vivian Howard, 2019 Ark. App. 15 [**professional evaluation ordered prior to hearing on Petition for Guardianship**] The Appellant challenged the circuit court's authority to issue an order for her to be evaluated. The appellate court found that the circuit court had statutory authority pursuant to Ark. Code Ann. 28-65-212(a)(1) which requires that the court order an evaluation before hearing a Petition for Guardianship if no professional evaluations performed within the last six months are available. (Benton, W.; CV-18-397; 1-16-19; Vaught, L.)

DISTRICT COURT

Newman v. State of Arkansas, 2019 Ark. App. 38, [**Sufficiency of Evidence**] [**Criminal Procedure**] [**Preservation of Argument for Appeal**] [**Legal Support for Argument for Appeal**] Newman was convicted of disorderly conduct and harassment in the District Court. He appealed both convictions to the Circuit Court. A jury acquitted him of harassment but found him guilty of disorderly conduct. Newman appealed his conviction of disorderly conduct stating there was insufficient evidence to support a conviction for disorderly conduct, that the disorderly conduct statute is overbroad, and that his prosecution violated his rights under the First Amendment. The evidence at trial established that Newman was confronted by his neighbors about playing loud music at his home. The situation improved for a few months, but then the

music got louder and more frequent. A neighbor contacted 911 after being awakened to the sound of Newman's voice over a public-address system. His speech was slurred, and the yelling was loud and angry. Initially, the neighbor thought there was a domestic disturbance in the neighborhood. After listening more closely, the neighbor realized Newman was directing his speech to her and her husband calling them profanities. The neighbor called 911 three more times when the screaming got louder. Sheriff Deputies did not make contact with Newman but described hearing "incoherent rambling" and a "drunken rant." Newman also broadcasted the national anthem. After about ten minutes, the noise stopped. The noise resumed the next day and continued for several hours. Another neighbor called 911 about the noise. The Court of Appeals held that the trial court did not err in denying defendant's motions for directed verdict because defendant failed to meet the requirements of specificity mandated Ark. R. Crim. P. 33.1. His argument that the disorderly conduct statute was unconstitutionally overbroad as applied to him also fails because Newman did not adequately develop and support his challenge with legal authority. He failed to identify and make clear whether the constitutional violation involved the Arkansas Constitution, the United States Constitution, or both, and he also failed to cite any case law in his motions. (Pearson, W.; 58CR-17-624; 1-23-19; Murphy, M.)